Supreme Court, U.S.
FILED
011161 DEC 28 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ELWOOD "JACK" CLUCK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Elwood Cluck, Petitioner
No. 2 Comanche Spur
The Wilderness Box 92
Kerrville, Texas 78028
Telephone: 830-896-2685

QUESTIONS PRESENTED

1. Whether Petitioner has shown that jurists of reason would find it debatable that the United States District Court, Western District of Texas, San Antonio Division, was incorrect in its procedural ruling entered on September 27, 2000, dismissing Petitioner's Motion pursuant to 28 U.S.C. Sec. 2255 and his further Motion pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) to Vacate the Conviction, Judgment and Sentence imposed upon Petitioner for Lack of original Subject Matter Jurisdiction, without reaching Petitioner's underlying constitutional claims of denial of his constitutional rights arising under Article III and the Fifth and Sixth Amendments to the Constitution which resulted in lack of original Subject Matter Jurisdiction in the District Court and thereafter, upon appeal, in the Court of Appeals, Fifth Circuit?

2. Whether the United States District Court lacked subject matter jurisdiction to entertain the Indictment, prosecution, trial, sentence and punishment of Petitioner because neither of the accusations recited by the Grand Jury in Counts I through VIII of the Indictment allege that Petitioner committed an offense against the United States as defined in 28 U.S.C. Sec. 1746 and/or in conjunction with 18 U.S.C. Sec. 152 for the following reasons:

A. Counts I through Count VIII recited by the Grand Jury are each devoid of at least one of the elements (materiality) required by both 28 U.S.C. Sec. 1746 and 18 U.S.C. Sec.

QUESTIONS PRESENTED – Continued

152, and at least one of the elements (the date the Declaration was signed) required by 28 U.S.C. Sec. 1746.

B. Counts I through VIII, each of which charge the commission of an offense *"in violation of Title 18 U.S.C. Sec. 152,"* do not allege that Petitioner violated either of the nine (9) separate, distinct and different subdivisions of Sec. 152.

C. Counts I through VIII, each of which charge the commission of an offense *"in violation of Title 18 U.S.C. Sec. 152,"* does not constitute "a plain, concise and definite written statement of the essential facts constituting the offense[s] charged" in Counts I through VIII.

D. Counts I, IV and VIII do not allege nor is there any recitation on the face of the Indictment that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was signed by Petitioner within the five year general Statute of Limitations provided by 18 U.S.C. Sec. 3282.

3. Whether Counts I through VIII of the Indictment, each of which charge the commission of an offense "within the meaning of Title 28, United States Code, Section 1746 . . . in violation of Title 18, United States Code, Section 152" violates:

(i) *The Fifth Amendment* guarantee that Petitioner *"shall [not] be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "* and

QUESTIONS PRESENTED – Continued

(ii) Petitioner's *Sixth Amendment* right *"to be informed of the nature and cause of the accusations . . . "* against him and

(iii) and Petitioner's *Fifth Amendment* right to *Due Process of Law* and

(iv) precludes Petitioner's *Sixth Amendment* right *"to be confronted with the witnesses against him."*

4. Whether Petitioner was required to demonstrate adequate cause for the alleged procedural default and actual prejudice resulting from failure to raise the issue of lack of subject matter jurisdiction in the District Court at the inception of the Indictment and prosecution of Petitioner and thereafter upon direct appeal of his conviction in order to prosecute his:

A. Motion pursuant to 28 U.S.C. Sec. 2255 to Vacate and Set Aside the Conviction, Sentence and Judgment imposed upon Petitioner for lack of Subject Matter Jurisdiction?

B. Motion pursuant to the provisions of 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) to Vacate and Set Aside the Conviction, Judgment and Sentence imposed upon Petitioner for lack of Subject Matter Jurisdiction?

5. Whether the Order of the United States Court of Appeals, Fifth Circuit, signed singly by Circuit Judge Jacque L. Wiener, Jr., entered on October 5, 2001, is directly contrary to the concurring Opinion expressed by

QUESTIONS PRESENTED – Continued

Justice Scalia in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 896-97, 111 S.Ct. 2631, 2648, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring) (discussing the "non-waivability" of lack of subject-matter jurisdiction) and also directly contrary to the precedents established by the United States Court of Appeals, Fifth Circuit, in *Thor v. United States*, 554 F.2d 759, 762 (5th Cir. 1977) and by the United States Court of Appeals, Seventh Circuit, in *Kelly v. United States*, 29 F.3d 1107 (7th Cir. 1994), and also contrary to the precedents established in the First, Third, Sixth, Seventh, Ninth, and Eleventh Circuits and the United States District Courts, Northern District of Illinois and Middle District of Mississippi, and inappropriately relied upon the Opinion expressed by the Supreme Court in *Slack v. McDaniel, Warden, et al.*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04, ___ L.Ed.2d ___ (April 26, 2000)?

PARTIES TO THE PROCEEDINGS

The undersigned Counsel of Record certifies that Parties to the proceedings are Elwood "Jack" Cluck, Petitioner (Defendant-Appellant in the Court of Appeals) and the United States of America, Respondent (Plaintiff-Appellee in the Court of Appeals).

Elwood Cluck, Pro Se

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

Summary 8

Arguments and Authorities 9

I. Failure of the Indictment To Allege an Offense Against the United States 9

II. Lack of Subject Matter Jurisdiction in the District Court 16

III. Lack of Subject Matter Jurisdiction in the Circuit Court of Appeals 19

IV. Rules of Procedure Relating to Subject Matter Jurisdiction 21

V. "Cause and Prejudice" as set forth in the October 5, 2000 Order 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95 L.Ed. 702, 71 S.Ct. 534, 19 A.L.R. 738 (1951) 21

Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398 (7th Cir. 1986) 25

Bender v. Williamsport Area School District, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)..... 20

Brazosport Towing Co. v. 3,838 Tons of Sorghum, 607 F. Supp. 11 (S.D. Tex. 1984), affirmed without opinion, 790 F.2d 891 (5th Cir. 1985)..... 26

Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 2 L.Ed. 229 (1804) 18, 21

Chambers v. Armonstrout, 16 F.3d 257 (8th Cir. 1984) 26

Commercial Nat'l Bank of Chicago v. Demos, 18 F.3d 485 (7th Cir. 1994)..... 18

Connecticut National Mortgage Co. v. Brandstatter, 897 F.2d 883 (7th Cir. 1990)..... 25

Evans v. United States, 325 F.2d 596 (8th Cir. 1963), cert. denied, 377 U.S. 968 (1964)..... 18

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991).....21, 28

Hardy v. United States, 691 F.2d 39 (1st Cir. 1982) 28

Harris v. United States, 149 F.3d 1304 (11th Cir. 1998).....19, 20

In re Edwards, 962 F.2d 641 (7th Cir. 1992)..... 25

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 684, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).....17, 20

TABLE OF AUTHORITIES – Continued

Page

Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) 11

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 23

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) 26

Kelly v. United States, 29 F.3d 1107 (7th Cir. 1994) 18, 27, 29

Lee Supply Corp. v. Agnew, 818 F.2d 1284 (7th Cir. 1987) 11

Lockett v. Puckett, Comm., Miss. Dept. Corrections, 988 F. Supp. 1019 (DC SD Miss. 1997) 29

Mansfield, C. & L.RM. R. Co. v. Swan, 111 U.S. 379, 28 L.Ed. 462, 4 S.Ct. 510 (1884) 21

Neder v. United States, ___ U.S. ___, 199 S.Ct. 1827, ___ L.Ed.2d ___ (June 10, 1999) 10

Nicks v. United States, 955 F.2d 166 (2nd Cir. 1992) 23

Noriake v. M/V Hellenic Champion, 627 F.2d 724 (5th Cir. 1980), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) 16

Prou v. United States, 199 F.3d 37 (1st Cir. 1999) 19

Rosecrans v. United States, 378 F.2d 561 (5th Cir. 1967) 17

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 14

Slack v. McDaniel, Warden, et al., 529 U.S. 473, 120 S.Ct. 1595, ___ L.Ed.2d ___ (April 26, 2000) 8

TABLE OF AUTHORITIES – Continued

Page

Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) 16

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 13, 14

Thor v. United States, 554 F.2d 759 (1977) 15, 17, 27

Tomasetta v. United States, 429 F.2d 978 (1st Cir. 1979) 14

United States v. Akram, 152 F.3d 698 (7th Cir. 1998) 11

United States v. Bass, 425 F.2d 161 (7th Cir. 1970) 13

United States v. Broadwell, 1992 WL 66649, 1992 U.S. App. Lexis 6366 (9th Cir. 1992) 29

United States v. Choate, 276 F.2d 724 (5th Cir. 1960) .. 15, 18

United States v. Donn, 661 F.2d 820 (9th Cir. 1981) 29

United States v. Drobny, 955 F.2d 990 (5th Cir. 1992) 16

United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) 28, 29

United States v. Garrett, 984 F.2d 1402 (5th Cir. 1993) 15

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) 11

United States v. Griffin, 303 U.S. 226, 58 S.Ct. 601, 82 L.Ed. 764 (1938) 20

United States v. Harper, 458 F.2d 891 (7th Cir. 1971) 13

United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988) (en banc) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Indoor Cultivation Equipment From High Tech Indoor Garden Supply, 55 F.3d 1311 (7th Cir. 1995) 25, 26

United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974) 18

United States v. Jackson, 836 F.2d 324 (7th Cir. 1987) 10

United Sates v. Key, 859 F.2d 1257 (9th Cir. 1988) 10

United States v. LaPlante, 57 F.3d 252 (2nd Cir. 1995) 23

United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993) 14

United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989) 16

United States v. Mayer, 235 U.S. 55, 35 S.Ct. 16, 59 L.Ed. 129 (1914) 23

United States v. Milestone, 626 F.2d 264 (3rd Cir.), cert. denied, 449 U.S. 920, 101 S.Ct. 319, 66 L.Ed.2d 148 (1980) 29

United States v. Mize, 756 F.2d 353 (5th Cir. 1985) 15

United States v. Moore, 185 F.2d 92 (5th Cir. 1950) 14

United States v. Morales-Rosales, 838 F.2d 159 (5th Cir. 1988) 14

United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) 24

United States v. Normandeau, 800 F.2d 953 (9th Cir. 1986) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. O'Donnell, 539 F.2d 1233 (9th Cir.), cert. denied, 429 U.S. 960, 97 S.Ct. 386, 50 L.Ed.2d 328 (1976) 11

United States v. Rivera, 879 F.2d 1247 (5th Cir. 1989) 14, 15

United States v. Stoneman, 870 F.2d 102 (3rd Cir. 1989) 24

United States v. Tucor International, Inc., 35 F. Supp.2d 1172 (N.D. Cal. 1998) 24

United States v. Williams, 899 F.2d 1526 (6th Cir. 1990) 29

United Transportation Union v. Illinois Central Railroad and Brotherhood of Locomotive Engineers, 998 F. Supp. 874 (DC ND Ill. 1998) 29

V.T.A., Inc. v. Airco, Inc., 597 F.2d 220 (10th Cir. 1979) 26

Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A Sept. 1981) 16

THE CONSTITUTIONAL PROVISIONS

Article V of the Amendments to the Constitution 2, 9, 11, 13, 30

Article VI of the Amendments to the Constitution 2, 9, 12, 13, 30

THE STATUTORY PROVISIONS

18 U.S.C. Sec. 152 ..... *passim*

28 U.S.C. Sec. 1651(a) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. Sec. 1746 ..... *passim*

28 U.S.C. Sec. 2255 ..... *passim*

Fed. R. App. P. 22(b)(2) 1

Fed. R. Crim. P. 7(c)(1) ..... *passim*

Fed. R. Crim. P. 12(b)(2) ..... *passim*

Fed. R. Crim. P. 34, the first sentence ..... *passim*

Fed. R. Civ. P. 60(b)(4) ..... *passim*

Rules and Internal Operating Procedures of the United States Court of Appeals, Fifth Circuit Rule 27.2.3 1

TEXTS

Federal Practice and Procedure, Charles Alan Wright & Arthur R. Miller, Sec. 2862, at pp. 198-200 (1973) 25

Federal Practice, J. Moore, Vol. 7, Sec. 60.25[2] (2nd ed. 1973) 26

Criminal Procedure, W. LaFave & J. Israel, Vol. 2, Sec. 19.2 at 452 (1984) 15

PETITION FOR WRIT OF CERTIORARI

Petitioner Elwood Cluck respectfully requests that a Writ of Certiorari be issued to review the Order and Judgment entered on October 5, 2001 in Docket No. 00-50952 and 01-50581, Consolidated, styled United States of America, Plaintiff-Appellee vs. Elwood "Jack" Cluck, Defendant-Appellant, in the United States Court of Appeals for the Fifth Circuit.

THE ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS

The Order and Judgment to be reviewed is set forth verbatim in Appendix A. The Order was signed singly by United States Circuit Judge Jacque L. Wiener, Jr. pursuant to Rule 27.2.3 of the Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit and Fed. R. App. P. 22(b)(2).

Petitioner filed a Motion for Panel Reconsideration of the Order signed singly by Judge Wiener on November 12, 2001, and a Motion to Recall the Mandate erroneously issued by the Clerk because the issuance of the Mandate contravenes Fed. R. App. 40(a)(1) and violated Fed. R. App. P. 41(a) and (b).

On November 16, 2001, Petitioner mailed a Motion for En Banc Reconsideration of the Order, including a Motion for Rehearing of Petitioner's Application and Supplemental Application for a Certificate of Appealability and a Rehearing of Petitioner's Motion to Vacate and Set Aside the Conviction, Judgment and Sentence in No. SA-95-CR-99(1)-EP pursuant to the provisions of 28 U.S.C. Sec. 2255 and 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4). On December 5, 2001, the Court of Appeals denied Petitioner's Motion for Panel Reconsideration of the Order signed singly by Judge Wiener

and Petitioner's Motion to Recall the Mandate. The Court did not consider or act upon Petitioner's Motion for En Banc Reconsideration of Judge Wiener's October 5, 2001 Order. A copy of the Order denying Petitioner's Motion for Panel Reconsideration of the Order dated October 5, 2001 and Petitioner's Motion to Recall the Mandate is set forth verbatim in Appendix B.

JURISDICTION

The statutory provision believed to confer jurisdiction on the Supreme Court is 28 U.S.C. Sec. 2101.

THE CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

Article V and Article VI of the Amendments to the Constitution are involved in the adjudication of this Case and are set out verbatim in Appendix C.

18 U.S.C. Sec. 152 and 28 U.S.C. Sec. 1746 and 28 U.S.C. Sec. 2255 and U.S.C. Sec. 1651 are each involved in the adjudication of this Case and are set out verbatim in Appendix D.

Fed. R. Crim. P. 7(c)(1), Fed. R. Crim. P. 12(b)(2), the first sentence of Fed. R. Crim. P. 34 and Fed. R. Civ. P. 60(b)(4) are also involved in this Case and are set out verbatim in Appendix E.

STATEMENT OF THE CASE

On March 27, 1995, the Grand Jury indicted Petitioner on eight Counts, each of which accuse Petitioner of

> " . . . mak[ing] a false statement under penalty of perjury within the meaning of [Title 28,

> United States Code, Section] 1746" and "conceal[ing]" property alleged to be part of the bankruptcy estate " . . . all in violation of Title 18, United States Code, Section 152."

A copy of the Indictment is set forth in Appendix F. Petitioner was not then and is not now guilty of the charges in Counts I through VIII of the Indictment.

Trial before a Jury commenced in the United States District Court, Honorable Edwardo C. Prado presiding, on January 6, 1997 and concluded on January 18, 1997 when the Jury returned its Verdict finding Petitioner Not Guilty of the charge in Count II and Guilty of the charges in Counts I and III through VIII. On May 23, 1997, Judge Prado sentenced Petitioner to a term of two years imprisonment followed by three years of Supervised Release. The Judgment was signed and entered on May 27, 1997.

Petitioner was incarcerated at the F.C.I. Satellite Prison Camp, Three Rivers, Texas, until November 30, 1999 when Petitioner was transferred to a Half-Way House in San Antonio, Texas. Petitioner was released from confinement on February 25, 2000 and began serving the sentence of three years supervised release.

While Petitioner was incarcerated at the Satellite Prison Camp, Petitioner filed a Motion pursuant to 28 U.S.C. Sec. 2255 in the United States District Court Western District of Texas, San Antonio Division, Honorable Edwardo C. Prado, presiding, to Vacate the Conviction, Judgment and Sentence imposed upon Petitioner in No SA-95-CR-99(1)-EP. Petitioner alleged that the Indictment presented by the Grand Jury failed to accuse Petitioner of an offense against the United States as defined in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152 because:

A. The Grand Jury did not allege that the actions considered to be offensive under the provisions of 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152 are material to the bankruptcy proceedings;

B. The Grand Jury did not specify which, if either or if any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 that Petitioner was accused of violating;

C. The Grand Jury did not allege that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was subscribed by Petitioner and *dated by Petitioner as the Declarant* within five years prior to the issuance of the Indictment on March 27, 1995, or that the Unsworn Declaration Under Penalty of Perjury was material to any matter alleged to be offensive under the provisions of 28 U.S.C. Sec. 1746

thereby resulting in a failure to state the commission of an offense against the United States and a lack of Subject Matter Jurisdiction and a complete miscarriage of justice.

The District Clerk informally referred Petitioner's Sec. 2255 Motion to a United States Magistrate Judge who filed her Report and Recommendations to the District Court, on June 8, 2000 with the recommendation that Petitioner's Sec. 2255 Motion be dismissed on the grounds that (1) the Sec. 2255 Motion was "successive" and (2) Petitioner failed to seek and obtain the consent of the Court of Appeals, Fifth Circuit, before filing his Sec. 2255 Motion in the District Court and (3) Petitioner raised or could have raised some of the issues involved in the Sec. 2255 Motion on his direct appeal.

On July 25, 2000, the District "accepted the Magistrate's conclusion that this case should be dismissed because:

> . . . this application is successive. . . . Moreover, the Petitioner has taken his arguments to the United States Court of Appeals for the Fifth Circuit and the arguments have been rejected by that court. Therefore, the Court agrees with the Magistrate that this case should be dismissed.

Petitioner filed a Motion to Reconsider, Rescind and Withdraw the July 25, 2000 Order of the District Court and the District Court entered a second Order on September 27, 2000 which recites:

> "On July 25, 2000, this Court dismissed Petitioner's 28 U.S.C. section 2255 motion to vacate and set aside his conviction, judgment and sentence, concluding that the motion was successive and thus could not be filed without authorization by the United States Court of Appeals for the Fifth Circuit. . . . The Court now concludes that the determination that this motion was successive was erroneous.
>
> . . .
>
> However, the Court agrees with the Government that the issues raised in [Petitioner's Sec. 2255 Motion] either were raised in Petitioner's direct appeal or could have been raised in that appeal. . . . Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors. Therefore the Court cannot reach the merits of the Petitioner's motion and will again deny the section 2255 motion. . . . "

Petitioner filed a Motion to Reconsider, Rescind and Withdraw the latter portion of the September 27, 2000 Order, together with Requests for Findings of Fact and Conclusions of Law and a request for a Certificate of Appealability. As a further challenge to the September 27, 2000 Order, Petitioner also filed a Motion in the District Court to Vacate and Set aside the Conviction, Judgment

and Sentence in No. SA-95-CR-99(1)-EP for lack of subject matter jurisdiction pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Fed. R. Crim. P. 12(b)(2), the first sentence of Fed. R. Crim. P. 34 and Fed. R. Civ. P. 60(b)(4).

On November 3, 2000, the District Court denied Petitioner's Motion to Reconsider, Rescind and Withdraw the September 27, 2000 Order and Petitioner's Motion to Vacate and Set aside the Conviction, Judgment and Sentence for lack of subject matter jurisdiction and Petitioner's Requests for Findings of Fact and Conclusions of Law and Petitioner's request for a Certificate of Appealability. Petitioner then timely filed a second Notice of Appeal to the Court of Appeals, Fifth Circuit and a request addressed to the Court of Appeals for a Certificate of Appealability.

On March 27, 2001, a Panel of the Court of Appeals "construed the district court's [September 27, 2000 Order for] partial grant of postjudgment relief as a request for leave from [the Court of Appeals] to grant such relief," which the Court of Appeals granted, and remanded the proceeding to the District Court for reentry of the September 27, 2000 Order "because the district court was without jurisdiction to issue its two post judgment orders [entered on September 27 and November 3, 2000]."

On May 24, 2001, the District Court reentered the September 27, 2000 Order and denied Petitioner's Motion for Entry of Judgment Vacating and Setting Aside the Conviction, Judgment and Sentence for lack of subject matter jurisdiction. Petitioner again filed Requests for Findings of Fact and Conclusions of Law and a request for a Supplemental Certificate of Appealability, each of which were denied by the District Court. Petitioner then

filed a third Notice of Appeal to the Court of Appeals for the Fifth Circuit

On June 29, 2001, Petitioner filed a Motion in the Court of Appeals, Fifth Circuit, pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) to Vacate and Set Aside the Conviction, Judgment and Sentence in No. SA-95-CR-99(1)-EP for lack of Subject Matter Jurisdiction

On October 5, 2001 Judge Jacque L. Wiener, Jr. signed an Order (Appendix 1) which recites that:

> "[Petitioner] alleges that there are numerous deficiencies in his indictment which, he contends, deprived the trial court of its jurisdiction. He argues that he may challenge the indictment and the trial court's jurisdiction at any time, including for the first time in a Sec. 2255 motion, without having to show cause and prejudice.
>
> [Petitioner] is correct that a claim that an indictment is so deficient as to deprive the convicting court of jurisdiction presents an issue that is cognizable under a 28 U.S.C. Sec. 2255 motion. . . . [H]owever, the government did raise procedural bar in the district court. *[Petitioner] is therefore required to demonstrate cause for his procedural default and actual prejudice resulting from the errors.* (Italics added)

Judge Wiener then denied Petitioner's Application and Supplemental Application for a Certificate of Appealability, concluding that Petitioner "has not made a showing that 'jurists of reason would find it debatable whether the district court was correct in its [September 27, 2000] procedural ruling.' "

REASONS FOR GRANTING THE WRIT

Summary

Judge Wiener relied upon *Slack v. McDaniel, Warden, et al.*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04, ___ L.Ed.2d ___ (April 26, 2000), to support denial of Petitioner's Application and Supplemental Application for a Certificate of Appealability because the District Court had dismissed Petitioner's Sec. 2255 Motion without reaching Petitioner's underlying constitutional claim of lack of Subject Matter Jurisdiction on the grounds that "the issues raised in [Petitioner's Sec. 2255 Motion] either were raised in Petitioner's direct appeal or could have been raised in that appeal [and Petitioner] has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors".

In the *Slack Case*, the district court denied Slack's Application for a Certificate of Appealability based on Slack's perceived failure to exhaust his state remedies with the result that Slack's Sec. 2254 Motion was "a second or successive habeas petition." The question of Subject Matter Jurisdiction was not involved in the perceived procedural default involved in the *Slack Case*. In the present case, lack of Subject Matter Jurisdiction required by Article III of the Constitution trumps exhaustion of state remedies resulting in the perceived procedural default in the *Slack Case* and distinguishes that case from the present proceeding.

Subject Matter Jurisdiction in the District Court and in the Court of Appeals required by Article III of the Constitution cannot be conferred by consent, agreement, waiver or procedural default and if not established pursuant to Article III, lack of Subject Matter Jurisdiction predominates, supersedes and extinguishes the right, power and authority of the United States to entertain and

conduct the trial, sentencing and imprisonment of Petitioner pursuant to 28 U.S.C. Sec. 1746 and/or 18 U.S.C. Sec. 152.

Petitioner clearly established lack of Subject Matter Jurisdiction in the District Court and in the Court of Appeals by his Motion to Vacate and Set Aside Petitioner's Conviction pursuant to his Sec. 2255 Motion and his further Motion to Vacate the Conviction for Lack of Subject Matter Jurisdiction, each of which demonstrate lack of Subject Matter Jurisdiction because the Grand Jury failed to allege that Petitioner committed an offense against the United States as defined in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152. Petitioner has therefore shown conclusively that jurists of reason would find that Petitioner's Sec. 2255 Motion and his further Motion to Vacate the Conviction for Lack of Subject Matter Jurisdiction states valid claims of denial of Petitioner's constitutional rights arising under Article III and the Fifth and Sixth Amendments to the Constitution, thereby resulting in a lack of Subject Matter Jurisdiction in the District Court and thereafter, in the Court of Appeals.

ARGUMENTS AND AUTHORITIES

I. Failure of the Indictment To Allege an Offense Against the United States

Continually since the inception of these proceedings on November 28, 1999, Petitioner has consistently argued that the District Court lacked subject matter jurisdiction to entertain the prosecution, trial, sentence and punishment of Petitioner because the accusations recited by the Grand Jury in Counts I through VIII of the Indictment do not allege violations of 28 U.S.C. Sec. 1746 and/or 18 U.S.C. Sec. 152 for the following reasons:

A. Counts I through VIII as recited by the Grand Jury are each devoid of at least one of the elements (materiality) required by both 28 U.S.C. Sec. 1746 and 18 U.S.C. Sec. 152, and at least one of the elements (the date the Declaration was signed) required by 28 U.S.C. Sec. 1746.

B. Counts I through VIII, each of which charge the commission of an offense *"in violation of Title 18 U.S.C. Sec. 152"*, do not allege the violation of either or any of the nine (9) separate, distinct, different and independent subdivisions of Sec. 152.

C. Counts I through VIII, each of which charge the commission of an offense *"in violation of Title 18 U.S.C. Sec. 152"*, does not constitute "a plain, concise and definite written statement of the essential facts constituting the offense[s] charged" in Counts I through VIII.

D. Counts I, IV and VIII do not allege that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was signed by Petitioner within the five year general Statute of Limitations provided by 18 U.S.C. Sec. 3282.

"Materiality" is an essential element of the offense defined in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152. *Neder v. United States*, ___ U.S. ___, 199 S.Ct. 1827, ___ L.Ed.2d ___ (June 10, 1999) ("[T]he well-settled meaning of 'fraud' [at common law] required a misrepresentation or concealment of material fact.") In *United States v. Key*, 859 F.2d 1257, 1260-61 (9th Cir. 1988), the Court of Appeals, Ninth Circuit, held:

> "Although Sec. 152 does not expressly include 'materiality' as an element of the offense, we have construed this section 'to require that [a] false oath be given in relation to some material matter.' *United States v. Jackson*, 836 F.2d 324, 329

(7th Cir. 1987) (quoting *United States v. O'Donnell*, 539 F.2d 1233, 1237 (9th Cir.), cert. denied, 429 U.S. 960, 97 S.Ct. 386, 50 L.Ed.2d 328 (1976). See also *Lee Supply Corp. v. Agnew*, 818 F.2d 1284, 1290 (7th Cir. 1987) (construing false oath under 11 U.S.C. Sec. 727(a)(4)(A) – denial of discharge – as requiring oath to be a material matter)."

The "materiality" of the offenses described in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152 must (a) be alleged in the Indictment issued by the Grand Jury and (b) the "materiality" of the offenses as alleged in the Indictment must be proven by the government beyond a reasonable doubt and (c) proof beyond a reasonable doubt of the "materiality" of the offenses as alleged in the Indictment must be decided by the jury. *United States v. Akram*, 152 F.3d 698, 700 (7th Cir. 1998) ("Since *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), it has been clear that materiality under [the perjury statute, 18 U.S.C.] Sec. 1623(a) is an element of the prosecution's case, and must therefore be submitted to the jury and proven beyond a reasonable doubt."); *United States v. Gaudin*, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *United States v. Normandeau*, 800 F.2d 953, 958 (9th Cir. 1986); Fed. R. Crim. P. 7(c)(1).

There are nine (9) subdivisions of 18 U.S.C. Sec. 152. Each of the nine (9) subdivisions of Sec. 152 defines and constitutes a separate and distinct offense against the United States as serially specified in subdivisions 1 through 9 of Sec. 152. The Grand Jury Clause of the Fifth Amendment and Fed. R. Crim. P. 7(c)(1) requires that the offense separately described in each of the nine (9) subdivisions of Sec. 152 must be alleged in the Indictment with sufficient particularity to comprise a "plain, concise and

definite written statement of the essential facts constituting the elements of the offense charged" in order to give Petitioner notice of the charge so that he may defend or plead against his case adequately. The Grand Jury did not accuse Petitioner of violating either of the nine (9) separate and distinct subdivisions specified in Sec. 152. The failure of the Grand Jury to specify which, if either or if any, of the nine (9) separate and distinct subdivisions of Section 152 were considered by the Grand Jury to be offensive to the laws of the United States violates Petitioner's *Fifth Amendment* guarantee that Petitioner *"shall [not] be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "* and Petitioner's *Sixth Amendment "right to be informed of the nature and cause of the accusations . . . "* against him. The failure by the Grand Jury to specify which, if either or if any, of the nine (9) subdivisions of Section 152 were considered by the Grand Jury to be offensive to the laws of the United States also violates Petitioner's *Fifth Amendment* right to *Due Process of Law* and precludes Petitioner's *Sixth Amendment* right *"to be confronted with the witnesses against him.*

Fed. R. Crim. P. 7(c)(1) also requires that the offense described in each of the nine (9) separate subdivisions of Sec. 152 must be material to the bankruptcy proceedings. Obviously, the Indictment fails to allege the materiality of any action, transaction, representation, omission or commission of any matter defined in 28 U.S.C. Sec. 1746 or either of the nine (9) separate subdivisions of Section 152 which Petitioner is accused of violating.

28 U.S.C. Sec. 1746 requires the Unsworn Declaration Under Penalty of Perjury referred to in the Indictment to be (1) in writing and (2) subscribed by Petitioner as the

Declarant and (3) *dated by Petitioner as the Declarant* in order to achieve validity under the authorization of that statute. The element of time and date is statutorily incorporated into the third requirement of 28 U.S.C. Sec. 1746 and therefore, the date when Petitioner signed the Unsworn Declaration is an essential element of the offense of "mak[ing] a false statement under penalty of perjury within the meaning of [Title 28, United States Code, Section] 1746" as alleged in the Indictment.

Neither of Counts I, IV or VIII of the Indictment allege *the date of execution* of the Unsworn Declaration Under Penalty of Perjury as required by 28 U.S.C. Sec. 1746. The Indictment therefore fails to allege that the Unsworn Declaration was subscribed by Petitioner and *dated by Petitioner as the Declarant* within five years prior to the issuance of the Indictment on March 27, 1995. The date of the Unsworn Declaration is crucial to any charge of perjury because a statement may be true if made on one date but perjurious if made on another. "[P]roof of signature alone . . . is insufficient by itself to make knowledge of the . . . contents attributable to the signor." *United States v. Harper*, 458 F.2d 891, 894-95 (7th Cir. 1971); *United States v. Bass*, 425 F.2d 161, 163 (7th Cir. 1970).

The omission of the element of materiality in each of the eight Counts of the Indictment, coupled with the ambiguity with regard to which, if any, of the eight Counts of the Indictment was considered by the Grand Jury in formulating the Indictment, and the omission of the date when the Unsworn Declaration was subscribed by Petitioner not only violates the Fifth and Sixth Articles of the Bill of Rights but also the requirement of Fed. R. Crim. P. 7(c)(1) that the Indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." *Stirone v. United*

States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *Tomasetta v. United States*, 429 F.2d 978 (1st Cir. 1979).

Therefore, since Counts I through VIII of the Indictment each fail to allege the elements of materiality and do not accuse Petitioner of violation of either of the nine (9) subdivisions of Sec. 152 and do not specify the date of signature of the Unsworn Declaration as required by the definition of the offenses described in 28 U.S.C. Sec. 1746 and 18 U.S.C. Sec. 152, the Indictment, whether viewed severally as to each of Counts I through VIII, or in its entirety, fails to state an offense or offenses against the United States cognizable by the United States District Court. *United States v. Rivera*, 879 F.2d 1247, 1251 (5th Cir. 1989) ("An [indictment] that fails to allege each material element of an offense fails to charge that offense") citing *United States v. Morales-Rosales*, 838 F.2d 159, 161-62 (5th Cir. 1988).

In *United States v. Lopez*, 2 F.3d 1342, 1368 (5th Cir. 1993), the Court of Appeals, Fifth Circuit, confirmed the long-standing precedents announced in *Russell v. United States*, 369 U.S. 749, 763-66, 82 S.Ct. 1038, 1047-48, 8 L.Ed.2d 240 (1962) and *Stirone v. United States*, 361 U.S. 212, 216-18, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960), as follows:

> An indictment that fails to allege . . . a necessary element of the offense is defective. See *Stirone v. United States*, 361 U.S. 212, 216-18, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (Hobbs Act); *United States v. Hooker*, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (En Banc) (RICO); *United States v. Moore*, 185 F.2d 92, 94 (5th Cir. 1950) (FSLA). This is true even though the language of section [152] contains no such requirement. See *Russell v. United States*, 369 U.S. 749, 763-66, 82 S.Ct. 1038,

> 1047-48, 8 L.Ed.2d 240 (1962); 2 W. LaFave & J. Israel, Criminal Procedure, Sec. 19.2 at 452 (1984). Finally, because an indictment, unlike a bill of information, cannot be amended, the failure to allege each element is fatal. Cf. *United States v. Garrett*, 984 F.2d 1402, 1415 (5th Cir. 1993); *United States v. Mize*, 756 F.2d 353, 355-56 (5th Cir. 1985).

Failure of the Indictment to sufficiently state an offense against the United States is jurisdictional and a fatal defect which can be raised at any time. *United States v. Rivera*, 879 F.2d 1247, 1251 (5th Cir. 1989) ("A defect in an indictment is jurisdictional."). In *Thor v. United States*, 554 F.2d 759, 762 (1977) the Court of Appeals, Fifth Circuit, explained:

> If the indictment upon which Thor was tried and convicted failed to allege a federal offense, the district court lacked the subject matter jurisdiction necessary to try Thor for the actions alleged in the indictment. See 18 U.S.C. Sec. 3231 (1970). Jurisdictional defects are always subject to attack under section 2255, as that statute expressly states. Accordingly, the matter was properly presented by Thor's section 2255 motion."

See also *United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960) (Where an indictment is required for jurisdiction, a waiver of indictment which is not authorized by rule or statute will not give a court jurisdiction to hear a case.)

Since the Grand Jury omitted the necessary and essential element of materiality in the allegations set forth in Counts I through VIII of the Indictment and did not accuse Petitioner of violation of either or any of the nine (9) subdivisions of Section 152 and also failed to specify the date of signature of the Unsworn Declaration as required by 28 U.S.C. Sec. 1746, it necessarily follows that the Grand Jury failed to allege the commission of an

offense against the United States as defined in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152. As a result, the District Court lacked subject matter jurisdiction to entertain the Indictment, prosecution, trial, sentencing and punishment of Petitioner.

II. Lack of Subject Matter Jurisdiction in the District Court

The requirement of subject matter jurisdiction relates directly to the Constitutional power of the District Court to entertain the Indictment issued March 27, 1995. The United States Attorney has never disputed Petitioner's allegations of lack of subject matter jurisdiction in the District Court and thereby waived any argument to the contrary.[1] The District Court refused to address the lack of subject matter jurisdiction occasioned by the failure of the Indictment to charge Petitioner with the commission of an offense against the laws of the United States. Rather than addressing the lack of subject matter jurisdiction occasioned by the defects in the Indictment, Judge Prado entered an Order on September 27, 2000, which held that:

> " . . . the issues raised in [Petitioner's Sec. 2255 Motion] either were raised in Petitioner's direct appeal or could have been raised in that appeal. . . . Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors.

---

[1] Fed. R. Civ. P. 6(a) and *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992); *United States v. Marcello*, 876 F.2d 1147, 1153 (5th Cir. 1989); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. Unit A Sept. 1981); *Noritake v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); *Smith v. Estelle*, 602 F.2d 694, 798 n. 19 (5th Cir. 1979), affirmed, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

> Therefore the Court cannot reach the merits of the Petitioner's motion and will again deny the section 2255 motion. . . . "

The conclusions stated in the portion of Judge Prado's Order quoted above are clearly erroneous. In *Thor v. United States*, 554 F.2d 759, 762 (1977) the Court of Appeals, Fifth Circuit, clearly contradicted the quoted conclusions in the following language:

> [T]he government argues that Thor's failure to assert the instant argument [lack of subject matter jurisdiction] at any prior state of the proceedings against him – that is, during either his trial or his direct appeal to this court – resulted in a waiver of that argument for the purposes of this collateral attack upon his conviction. On this score, the government is clearly wrong. . . . Accordingly, the matter was properly presented by Thor's section 2255 motion."

Petitioner's challenge to the subject matter jurisdiction in the District Court, precipitated by invalidity of the Indictment, is not foreclosed by the prior direct appeal[2] of the conviction and sentence imposed upon Petitioner. Petitioner has the constitutional right to challenge subject matter jurisdiction at any time, including direct appeal and post-conviction-appeal proceedings pursuant to 28 U.S.C. Sec. 2255. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 684, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). See also *Rosecrans v. United States*, 378 F.2d 561 (5th Cir. 1967) (Subject matter jurisdiction is always subject to collateral attack).

---

[2] The Opinion reported at 143 F.3d 174 (5th Cir. June 3, 1998) clearly shows that lack of Subject Matter Jurisdiction was not raised in nor considered by either the District Court or by the Court of Appeals.

Petitioner was not required to demonstrate the reason that the lack of subject matter jurisdiction was not raised in his direct appeal. Petitioner is presumed innocent at the outset and the obligation as well as the burden of establishing subject matter jurisdiction is imposed on the District Court and the Prosecutor, not on Petitioner.

The District Court had an obligation at the inception of this case and at all times thereafter to assure itself of its own jurisdiction. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127, 2 L.Ed. 229 (1804) ("Here it was the duty of the court to see that they had jurisdiction, for the consent of the parties could not give it."); *Commercial Nat'l Bank of Chicago v. Demos*, 18 F.3d 485, 487 (7th Cir. 1994) ("That the parties have not contested, nor the district court considered jurisdiction does not impede our inquiry. . . . [W]e must consider the issue *sua sponte* when it appears from the record that jurisdiction is lacking.").

Moreover, Petitioner did not waive the lack of subject matter jurisdiction by failure to raise the issue on direct appeal. Lack of subject matter jurisdiction may not be waived by Petitioner. *United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960) (Where an indictment is required for jurisdiction, a waiver of indictment which is not authorized by rule or statute will not give a court jurisdiction to hear a case.); *United States v. Isaacs*, 493 F.2d 1124, 1140 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Evans v. United States*, 325 F.2d 596, 602 (8th Cir. 1963), cert. denied, 377 U.S. 968 (1964). Since the lack of subject matter jurisdiction cannot be procedurally defaulted in the first place, it is therefore a non-sequitur to suggest that Petitioner waived the lack of jurisdiction in the District Court to subject Petitioner to prosecution, trial, sentencing and punishment. *Kelly v. United States*, 29 F.3d 1107, 1112-1113

(7th Cir. 1994); *Harris v. United States*, 149 F.3d 1304, 1309 (11th Cir. 1998).

Finally, Petitioner is not required to show "cause and prejudice" in order to raise jurisdictional defects. *Kelly v. United States*, supra, ("The point of 'cause and prejudice' is to overcome waiver, but jurisdictional defects are not waivable."). *Harris v. United States*, supra, ("The 'cause and prejudice' standard is inapplicable in a collateral attack based on jurisdictional grounds. Jurisdictional defects cannot be procedurally defaulted. In short, because a jurisdictional defect cannot be defaulted, a defendant need not show cause to justify his failure to raise such a claim".).

III. Lack of Subject Matter Jurisdiction in the Circuit Court of Appeals

The requirement of Subject Matter Jurisdiction also relates directly to the Constitutional power, duty and obligation of the Court of Appeals to review the Indictment, prosecution, trial, sentence and punishment of Petitioner. If the District Court suffered lack of subject matter jurisdiction, it necessarily follows that the Court of Appeals likewise suffers lack of jurisdiction. For that reason, the question of subject matter jurisdiction is always open and both the District Court and the Court of Appeals are obligated at every stage of the proceedings, including the appellate proceedings, to consider the issue even though both the United States Attorney and the District Court refused to consider the lack of subject matter jurisdiction during the proceedings in the District Court and thereafter during the direct appeal before the Fifth Circuit. *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999).

Judge Wiener's refusal to address Petitioner's allegations of lack of subject matter jurisdiction in District Court and thereafter in the Court of Appeals is directly contrary to the precedent established by the Supreme Court in *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986) where the Supreme Court held

> "[E]very federal appellate court has a special obligation to satisfy not only its own jurisdiction but also that of the lower court in a cause under review."

Judge Wiener's refusal to review, consider and adjudicate the lack of subject matter jurisdiction in the District Court and thereafter in the Court of Appeals also contrasts with *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) where the Court of Appeals, Eleventh Circuit, held:

> As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 684, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). We therefore cannot derive power to act from the actions of the parties before us. *See id.* at 702. Consequently, the parties are incapable of conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default. *See United States v. Griffin*, 303 U.S. 226, 229, 58 S.Ct. 601, 82 L.Ed. 764 (1938) ("Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention.").

Further, Judge Wiener's refusal to consider lack of subject matter jurisdiction in the Court of Appeals is contrary to the observations of Justice Scalia in discussing the "non-waivability of subject-matter jurisdiction" in his

concurring Opinion in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 896-97, 111 S.Ct. 2631, 2648, 115 L.Ed.2d 764 (1991) quoted as follows:

> Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so – not, however, because the error was structural, but because, whether structural or not, it deprived the federal court of its requisite subject matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed sua sponte by a court, at all points in the litigation, see, e.g., *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, 95 L.Ed. 702, 71 S.Ct. 534, 19 A.L.R. 738 (1951); *Mansfield, C. & L.R.M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L.Ed. 462, 4 S.Ct. 510 (1884); *Capron v. Van Noorden*, 2 Cranch 126, 127, 2 L.Ed. 229 (1804). *Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, i.e., the effect of approving, ex ante, unlawful action by the appellate court itself.* (Italics added)

Surely no further explanation is required in order to demonstrate the error of Judge Wiener's refusal to address Petitioner's allegations of lack of subject matter jurisdiction in the District Court and thereafter in the Court of Appeals.

IV. Rules of Procedure Relating to Subject Matter Jurisdiction

After Judge Prado refused to recognize or consider Petitioner's allegations of the lack of subject matter jurisdiction in the District Court, Petitioner filed an additional

Motion in the District Court on October 24, 2000 pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) to Vacate and Set Aside the Conviction, Judgment and Sentence in Docket No. SA-95-099(1)-EP for Lack of Original Subject Matter Jurisdiction. Judge Prado denied Petitioner's Motion to Vacate for Lack of Subject Matter Jurisdiction on November 3, 2000 without explanation. Petitioner then filed a second Motion directly with the Court of Appeals, Fifth Circuit, to Vacate and Set Aside the Conviction, Judgment and Sentence in No. SA-95-CR-099(1)-EP for lack of Subject Matter Jurisdiction pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Fed. R. Crim. P. 12(b)(2) and the first sentence of Fed. R. Crim. P. 34 and Fed. R. Civ. P. 60(b)(4).

Neither the United States Attorney nor Judge Wiener addressed the deficiencies in the Indictment nor the lack of subject matter jurisdiction in the District Court and thereafter in the Court of Appeals although the lack of subject matter jurisdiction occasioned by the deficiencies in the Indictment was clearly set forth with appropriate citations of authority in Petitioner's Motion to Vacate pursuant to 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4). Judge Wiener avoided consideration or ruling on Petitioner's Motion to Vacate for lack of Subject Matter Jurisdiction with the observation that

> [Petitioner] also asks us to vacate his conviction and sentence, pursuant to 28 U.S.C. Sec. 1651, contending that the district court lacked jurisdiction because of the defective indictment. This

> motion is DENIED. [Petitioner] is still "in custody" for purposes of 28 U.S.C. Sec. 2255, coram nobis is an inappropriate mechanism for challenging his conviction and sentence.

The separate, collective and independent application of 28 U.S.C. Sec. 1651 and Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) is not circumscribed by the Sec. 2255 Motion nor by whether Petitioner is or is not "in custody". The relief sought by Petitioner's Motion to Vacate for lack of subject matter jurisdiction in the District Court and in the Court of Appeals is parallel to and co-extensive with the relief provided by Petitioner's Sec. 2255 Motion. Neither Motion supersedes nor supplants nor contradicts the other and each Motion is co-equal and complementary of the other insofar as Subject Matter Jurisdiction is required by Article III of the Constitution. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (The original purpose of the writ of habeas corpus was to allow relief where a defendant was convicted by a court that lacked jurisdiction.)

Sec. 1651 provides for a federal post-conviction remedy in the nature of a Writ of Error *Coram Nobis*[3] authorized by the All Writs Act and available for correction of errors "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Mayer*, 235 U.S. 55, 35 S.Ct. 16, 59 L.Ed. 129 (1914). Lack of subject matter jurisdiction is an example of the fundamental errors that can be corrected by the

---

[3] Fed. R. Civ. P. 60(b), which abolished the Writ of Error Coram Nobis in civil cases, does not apply to the use of the Writ of Error Coram Nobis as a post-conviction remedy in criminal cases. *United States v. LaPlante*, 57 F.3d 252, 253 (2nd Cir. 1995); *Nicks v. United States*, 955 F.2d 166-67 (2nd Cir. 1992).

Writ of Error *Coram Nobis* pursuant to Sec. 1651. *United States v. Morgan*, 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248 (1954). Lack of subject matter jurisdiction is also a fundamental error which renders the trial, conviction and sentence imposed by the District Court in Docket No. SA-CR-95-099-EP void. *United States v. Stoneman*, 870 F.2d 102 (3rd Cir. 1989). (The error goes to the jurisdiction of the trial court, thus rendering the trial itself invalid.) Here, the District Court's lack of subject matter jurisdiction due to defects in the Indictment constitutes Constitutional and jurisdictional errors which rendered the trial itself invalid and thereby resulted in a complete miscarriage of justice. *United States v. Tucor International, Inc.*, 35 F. Supp.2d 1172 (N.D. Cal. 1998) (Relief granted on jurisdictional ground that indictment failed to allege an offense.). Consequently, where Sec. 1621 is employed to challenge the lack of subject matter jurisdiction of the District Court, Sec. 1621 constitutes a remedy parallel to Sec. 2255 which is available to provide relief from a conviction otherwise void for lack of subject matter jurisdiction, regardless of whether Petitioner is or is not in custody for purposes of Sec. 2255.

In like manner, the relief sought by Petitioner's Motion to Vacate and Set Aside the Conviction for lack of subject matter jurisdiction in the District Court and in the Court of Appeals pursuant to Sec. 2255 and Sec. 1651 is parallel to and co-extensive with Fed. R. Crim. P. 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4). Where the conviction and Judgment is void for lack of subject matter jurisdiction, Petitioner is entitled to the relief provided by Rule 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. P. 60(b)(4) separately, severally or collectively and independently of and from Sec. 2255 and/or Sec. 1651. There is no

statutory or procedural requirement that Petitioner should make an election of the remedies separately afforded by Sec. 2255 or Sec. 1651 or Fed. R. Crim. P. 7(c)(1) or Rule 12(b)(2) or the first sentence of Rule 34 or Fed. R. Civ. P. 60(b)(4) where the pivotal issue is lack of subject matter jurisdiction in the District Court and/or the Court of Appeals. Petitioner is entitled to prosecute his Motion to Vacate For Lack of Subject Matter Jurisdiction in both the District Court and thereafter in the Court of Appeals by employing either or all of the statutes or rules just mentioned, separately, severally, collectively or independently of each other.

Fed. R. Civ. P. 60(b)(4), for example, requires the District Court to relieve Petitioner from the Judgment where the conviction is void for lack of subject matter jurisdiction. In *United States v. Indoor Cultivation Equipment From High Tech Indoor Garden Supply*, 55 F.3d 1311 (7th Cir. 1995), the Court of Appeals, Seventh Circuit, explained:

> "[A] judgment is void for purposes of Rule 60(b)(4) "if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, Sec. 2862, at pp. 198-200 (1973)). . . . Although ordinarily a district judge has broad discretion in the application of Rule 60(b), *Connecticut National Mortgage Co. v. Brandstatter*, 897 F.2d 883, 884 (7th Cir. 1990), this is not true with respect to motions brought under Rule 60(b)(4). Because void judgments are legal nullities, district courts have little leeway. *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). If the underlying judgment is

> void, *it is a per se abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4).*" (Italics added)

Petitioner's Motion pursuant to Fed. R. Civ. P. 60(b)(4) to set aside and vacate the conviction, judgment and sentence imposed upon Petitioner because of lack of original subject matter jurisdiction of the District Court is not a matter within the discretion of the either the District Court or the Court of Appeals. *Brazosport Towing Co. v. 3,838 Tons of Sorghum*, 607 F. Supp. 11, (SD Tex. 1984) ("A void judgment is 'a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.' *Jordan v. Gilligan*, 500 F.2d 701, 704 (6th Cir. 1974); see 7 J. Moore, Federal Practice. 60.25[2] (2nd Ed. 1973).") affirmed without opinion 790 F.2d 891 (5th Cir. 1985); *United States v. Indoor Cultivation Equip.*, 55 F.3d 1311 (7th Cir. 1995); *Chambers v. Armonstrout*, 16 F.3d 257 (8th Cir. 1984) reh. en banc denied; *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979). The grant of relief under Rule 60(b)(4) does not depend on "cause and prejudice" nor require a Certificate of Appealability for its review. While the grant of relief under other provisions of Fed. R. Civ. P. 60(b) are discretionary, the grant of relief under Rule 60(b)(4) is automatic. Once lack of subject matter jurisdiction is established, the application of Rule 60(b)(4) is mandatory. In principle, the same relief is mandatory under Fed. R. Crim. P. 7(c)(1) and Rule 12(b)(2) and the first sentence of Rule 34.

V. "Cause and Prejudice" as set forth in the October 5, 2000 Order

Judge Wiener denied Petitioner's Application and Supplemental Application for a Certificate of Appealability and Petitioner's Motion to Vacate the Conviction

and Sentence for Lack of Subject Matter Jurisdiction on the ground that Petitioner is *"required to demonstrate cause for his procedural default and actual prejudice resulting from the errors. . . . "*

Judge Wiener's conclusion that Petitioner "is required to demonstrate cause for his procedural default and actual prejudice resulting from the [lack of subject matter jurisdiction in the District Court]" is directly contrary to the precedent established by the Court of Appeals, Fifth Circuit, in *Thor v. United States*, 554 F.2d 759, 762 (1977) in which the Fifth Circuit clearly held that

> "[T]he government argues that Thor's failure to assert the instant argument at any prior state of the proceedings against him – that is, during either his trial or his direct appeal to this court – resulted in a waiver of that argument for the purposes of this collateral attack upon his conviction. On this score, the government is clearly wrong. If the indictment upon which Thor was tried and convicted failed to allege a federal offense, the district court lacked the subject matter jurisdiction necessary to try Thor for the actions alleged in the indictment. See 18 U.S.C. Sec. 3231 (1970). Jurisdictional defects are always subject to attack under section 2255, as that statute expressly states. Accordingly, the matter was properly presented by Thor's section 2255 motion."

Judge Wiener's conclusion is also directly contrary to *Kelly v. United States*, 29 F.3d 1107 (7th Cir. 1994), in which the Court of Appeals, Seventh Circuit, held

> "The heart of the government's argument is that [Kelly] has waived this argument by not presenting it earlier. More precisely (since there is a technical difference between "waiver" and "procedural default"), the government insists Kelly's argument under Sec. 851 is not cognizable on a

> Sec. 2255 motion absent a showing of "cause and prejudice", a showing the government insists that Kelly cannot make. . . . But it seems to us that this whole argument misses the point. *Frady*[4] is essentially a case about waiver. . . . The point of cause and prejudice, we repeat, is to overcome the waiver. But this analysis of course assumes that the error in question is a waivable one. And jurisdictional defects are not . . . . Because jurisdictional defects are non-waivable, Kelly need not provide us with an excuse ("cause and prejudice") adequate to convince us to forgive his waiver. That being the case, the judgment of the district court, denying Kelly's motion for relief under Sec. 2255, must be reversed." [29 F.3d at 1111, 1112, 1113 and 1114]

The conclusion that Petitioner "is required to demonstrate cause for his procedural default and actual prejudice resulting from the [lack of subject matter jurisdiction in the District Court]" is also contrary to the concurring Opinion expressed by Justice Scalia in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 896-97, 111 S.Ct. 2631, 2648, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring) discussing the "non-waivability" of lack of subject-matter jurisdiction and quoted in part at p. 19 infra.

Finally, Judge Wiener's conclusion is also contrary to the precedents established in the First, Third, Sixth, Seventh, Ninth and Eleventh Circuits and the District Courts, Northern District of Illinois and Middle District of Mississippi as follows: *Hardy v. United States*, 691 F.2d 39, 41 (1st Cir. 1982) ("While it is not clear that *Frady* applies where a court acts without authority, as opposed to erring

---

[4] *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

within the range of its authority, the existence of prejudice is clear."); *United States v. Milestone*, 626 F.2d 264, 267 n. 2 (3rd Cir.), cert. denied, 449 U.S. 920, 101 S.Ct. 319, 66 L.Ed.2d 148 (1980) (observing, before *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) that "although petitioner did not raise this issue on direct appeal, collateral review is available under Sec. 2255 to correct jurisdictional errors"); *United States v. Williams*, 899 F.2d 1526, 1529 (6th Cir. 1990) (Notwithstanding Williams' knowing and intelligent waiver of the jurisdictional requirements of Sec. 851(a)(1), his waiver was ineffectual to establish subject matter jurisdiction.); *Kelly v. United States*, 29 F.3d 1107, 1112-14 (7th Cir. 1994) ("Because jurisdictional defects are nonwaivable, Kelly need not provide us with an excuse ("cause and prejudice") adequate to convince us to forgive his waiver."); *United States v. Donn*, 661 F.2d 820 (9th Cir. 1981) ("There is no barrier to the examination of the propriety of a court's original exercise of jurisdiction on a Sec. 2255 Motion."); *United States v. Broadwell*, 1992 WL 66649, *2, 1992 U.S. App. Lexis 6366, *5 (9th Cir. 1992) ("because [the error] is jurisdictional, [the defendant] need not show cause and prejudice."); *Lockett v. Puckett, Comm., Miss. Dept. Corrections*, 988 F. Supp. 1019, 1023 (DC SD Miss. 1997) (28 U.S.C. Sec. 2254 Habeas claim challenging jurisdiction of a state court due to insufficiency of the indictment is not subject to procedural default.); *United Transportation Union v. Illinois Central Railroad and Brotherhood of Locomotive Engineers*, 998 F. Supp 874, 882 fn. 3 (DC ND Ill. 1998) ("Here the grounds advanced by BLE and IC are jurisdictional and therefore were not waived by the parties failure to raise them in the arbitration hearings.").

CONCLUSION

The Court of Appeals has entered an Order signed singly by Circuit Court Judge Wiener which is in conflict with the decisions of the Supreme Court and the First, Third, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeal and the District Courts, Northern District of Illinois and Middle District of Mississippi, on the same important matter and has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the United States District Court as to call for an exercise of the supervisory powers of the Supreme Court.

As shown by the authorities set forth above, the District Court erred in its September 27, 2000 Order and thereafter the Court of Appeals erred in its October 5, 2001 Order denying Petitioner's Application and Supplemental Application for a Certificate of Appealability without reaching Petitioner's underlying constitutional claim of lack of Subject Matter Jurisdiction. Petitioner has shown, at least, that jurists of reason would find that Petitioner's Sec. 2255 Motion reflecting a lack of Subject Matter Jurisdiction and his further Motion to Vacate the Conviction for Lack of Subject Matter Jurisdiction state a valid claim of the denial of Petitioner's constitutional rights arising under Article III and the Fifth and Sixth Amendments to the Constitution.

Dated December 28, 2001 and

Respectfully submitted,

ELWOOD CLUCK, *Petitioner*
No. 2 Comanche Spur
The Wilderness Box 92
Kerrville, Texas 78028

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50952 c/w No. 01-50581
USDC No. SA-99-CV-1417 c/w
USDC No. SA-95-CR-99-ALL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELWOOD CLUCK, also known as Jack Cluck,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(Filed Oct. 5, 2001)

ORDER:

Defendant-Appellant Elwood Cluck, federal prisoner # 68640-080, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion. On remand from this court, the district court reentered its order in which it granted, in part, Cluck's motion for reconsideration of its dismissal of the motion as successive. That court dismissed Cluck's motion on other grounds, however, holding that he was procedurally barred from raising the issues of adequacy

of the indictment and fairness of the restitution order in the instant motion. These issues either had been raised in Cluck's direct appeal or could have been, and Cluck has failed to demonstrate (1) cause for his failure to raise these issues on appeal and (2) actual prejudice stemming from the alleged errors.

Cluck's motion filed on January 19, 2001 for leave to file a supplemental COA motion is GRANTED. His motion for a supplemental COA, filed June 27, 2001, is DENIED. His motions to supplement the record with copies of the indictment and to dispense with the filing and docketing fees in case No. 01-50581 are DENIED as UNNECESSARY.

To obtain a COA, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "[A]n applicant makes a substantial showing [of the denial of a constitutional right] when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). If the district court has dismissed a § 2255 motion on procedural grounds without reaching the merits of the claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Cluck alleges that there are numerous deficiencies in his indictment which, he contends, deprived the trial court of its jurisdiction. He argues that he may challenge the indictment and the trial court's jurisdiction at any time, including for the first time in a § 2255 motion, without having to show cause and prejudice. Cluck also asserts that the government did not raise procedural bar in the district court.

Cluck is correct that a claim that an indictment is so deficient as to deprive the convicting court of jurisdiction presents an issue that is cognizable under a 28 U.S.C. § 2255 motion. *United States v. Prince*, 868 F.2d 1379, 1383 (5th Cir. 1989). Contrary to Cluck's assertion, however, the government did raise procedural bar in the district court. Cluck is therefore required to demonstrate cause for his procedural default and actual prejudice resulting from the errors. *See United States v. Drobny*, 955 F.2d 990, 994-95 (5th Cir. 1995); *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). This cause-and-prejudice test must be met even when a fundamental constitutional error is alleged. *See Murray v. Carrier*, 477 U.S. 478, 493 (1986).

Cluck concedes that he did not raise the issue of jurisdiction on direct appeal, yet he does not challenge the district court's determination that he failed to demonstrate cause and prejudice. As for the other issues that he raised for the first time in his 28 U.S.C. § 2255 motion, Cluck similarly fails to challenge the district court's determination regarding cause and prejudice; neither does he challenge that court's conclusion that several of his issues had been raised and rejected on direct appeal. We will not discuss legal issues that the COA applicant has failed to assert. By failing to challenge the district

court's reasons for holding that review of his claims was procedurally barred, Cluck has abandoned his challenge to this holding. *See Brinkman v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). Therefore, he has not made a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Hernandez*, 213 F.3d at 248. A COA is DENIED.

Cluck also asks us to vacate his conviction and sentence, pursuant to 29 U.S.C. § 1651, contending that the district court lacked jurisdiction because of the defective indictment. This motion is DENIED. Cluck is still "in custody" for purposes of 28 U.S.C. § 2255, coram nobis is an inappropriate mechanism for challenging his conviction and sentence. *See United States v. Hatten*, 167 F.3d 884, 887 n.6 (5th Cir. 1999); *Ojo v. INS*, 106 F.3d 680, 681 n.2 (5th Cir. 1997).

MOTION FOR COA DENIED; JANUARY 19 MOTION TO FILE SUPPLEMENTAL COA MOTION GRANTED; JUNE 27 MOTION FOR SUPPLEMENTAL COA DENIED; MOTIONS TO SUPPLEMENT THE RECORD AND TO DISPENSE WITH FILING AND DOCKETING FEES IN CASE NO. 01-50581 DENIED AS UNNECESSARY; MOTION TO VACATE CONVICTION AND SENTENCE DENIED.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50952
consolidated with
No. 01-50581

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ELWOOD CLUCK, also known as Jack Cluck

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas, San Antonio

(Filed Dec. 5, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to recall the mandate is DENIED.

A member of this panel previously denied appellant's motion for certificate of appealability and motion to

vacate the district court judgment. The panel has considered appellant's motion for reconsideration. IT IS FURTHER ORDERED that the motion is DENIED.

APPENDIX C

Article [V] of the Amendments to the Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article [VI] of the Amendments to the Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

APPENDIX D

18 U.S.C. Sec. 152: A person who –

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage or

promise thereof for acting or forebearing to act in any case under this title;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

28 U.S.C. Sec. 1746: Wherever, under any law of the United States or under any rule, regulation, order or requirement made pursuant to law, any matter is required

or permitted to be supported, evidenced, established, or proven by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proven by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed within the United States: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)"

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

28 U.S.C. Sec. 2255: A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is

otherwise subject to collateral attack, may move the court that imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the courts find that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgments vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. Sec. 1651(a): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX E

Fed. Rules of Crim. Proc. Rule 7(c)(1): The Indictment and the Information (c) Nature and Contents. (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single court that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged there to have violated.

Fed. Rules of Crim. Proc. Rule 12(b)(2): Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

Fed. Rules of Crim. Proc. Rule 34: The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged.

Fed. Rules of Civ. Proc. Rule 60(b)(4): On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment,

order or proceeding for the following reasons . . . (4) the judgment is void.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, Plaintiff v. ELWOOD "JACK" CLUCK Defendant.	) CRIMINAL NO. _____ INDICTMENT [COUNTS 1-8; Vio: 18 U.S.C. 152: Bankruptcy Fraud] (Filed March 27, 1995)

THE GRAND JURY CHARGES THAT:

INTRODUCTION

1. The primary purpose of the bankruptcy system is to provide relief for debtors who have become overburdened with debts that are beyond their ability to pay, to grant the debtors a discharge from the debts and to provide a financial "fresh start". The debtor is a person or company that requests relief through bankruptcy. The document the debtor files with the bankruptcy court to request the relief is called a bankruptcy petition. The creditors are those persons or entities that are owed money or have a claim against the debtor. There are different types of relief the debtor may request, reorganization which involves a proposal to pay the debts or a portion of the debts from future earnings, or liquidation where the debtor turns over all his assets to be sold to pay his debts and receives a discharge from his debts. A liquidation type of bankruptcy is known as a Chapter 7 bankruptcy. When the debtor files a petition for relief

under Chapter 7 a trustee is appointed who is responsible for locating and collecting the debtor's assets, property, or claims the debtor has against others, collecting or selling the assets for cash and distributing the funds equally to the creditors. The debtor's assets and property is [sic] known as the bankruptcy estate. In order for the trustee to locate and collect the debtor's assets, and in order for the trustee, court and the creditors to properly administer the estate, the debtor is required to prepare, sign and file certain documents with the bankruptcy court which disclose the location and/or value of his financial records, his assets, claims he has against others, who his creditors are, the amount he owes said creditors and his financial transactions over the last year. One of the main documents a debtor who was in business is required to file is known as a "Statement of Financial Affairs For Debtor Engaged in Business" (hereafter referred to as Statement of Financial Affairs). The debtor is required to answer questions about his books and records and financial transactions including all payments he made to his creditors over the 90 days before he filed for bankruptcy and transfers of property he made over the last year. He must also file "Schedules" listing his assets and property, and other schedules listing his debts. The debtor must respond to all questions, list all property and debts and sign these documents as being true and correct under penalty of perjury. The debtor should amend the Statement of Financial Affairs and the Schedules if either he finds a mistake or if circumstances reported on the statement or schedules changes.

2. At all times material to this indictment Defendant **ELWOOD "JACK" CLUCK** was an attorney licensed to

practice law in the State of Texas and the courts of the United States District Court for the Western District of Texas, including the United States Bankruptcy Court for the Western District of Texas.

3. At all times material to the indictment Defendant **ELWOOD "JACK" CLUCK** was engaged in the private practice of law as a sole practitioner.

4. On or about March 30, 1990, Defendant **ELWOOD "JACK" CLUCK** voluntarily filed or caused to be filed a petition requesting relief under Chapter 7 of the Bankruptcy Code.

5. On or about May 1, 1990, Defendant **ELWOOD "JACK" CLUCK** filed or caused to be filed a Statement of Financial Affairs and a set of Schedules, which as to the answers contained in the Statement of Financial Affairs and the Schedules Defendant **ELWOOD "JACK" CLUCK** declared under penalty of perjury were true and correct to the best of his knowledge. On or about May 3, 1990, Defendant **ELWOOD "JACK" CLUCK** under oath at the first meeting of creditors, swore that the Statement of Financial Affairs and the Schedules were true and correct.

COUNT I
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently made a false statement under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant **ELWOOD "JACK" CLUCK** filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas as part of his Statement of Financial Affairs a "Schedule B-2 – Personal Property" in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, wherein he knowingly and fraudulently stated in answer to item "q" which asks for "Contingent and unliquidated claims of every nature, including counterclaims of the debtor" that he only had (1) "Accounts receivable for billed but uncollected fees" of $10,000.00 and that he had (2) "Work in progress on pending litigation and office practice (legal)" of $5,000.00, when in truth and in fact, as the Defendant well knew, he greatly understated the market value of his interest in monies and accounts receivables and work in progress owed to him by:

A. Perfect Union Lodge, and

B. The O. D. Dooley Estate.

All in violation of Title 18, United States Code, Section 152.

COUNT II
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas:

A. His transfer within one year of the filing of the petition for bankruptcy of a $50,000 Real Estate Lien note and the Dead of Trust securing said note both having been executed on behalf of Perfect Union Lodge, back to Perfect Union Lodge, and

B. The transfer within one year of the filing of the petition for bankruptcy of approximately 351, more or less, acres of land located in McMullen County, Texas, and

C. The transfer within one year of the filing of the petition for bankruptcy of:

1. three jaguar automobiles, and
2. a pickup truck, and
3. a camper, and
4. a boat, and
5. a 1960 Beechcraft Bonanza Airplane.

All in violation of Title 18, United States Code, Section 152.

COUNT III
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about June 28, 1991, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $35,000.00 in payment for a pre-bankruptcy accounts receivable from Perfect Union Lodge. All in violation of Title 18, United States Code, Section 152.

COUNT IV
(18 U.S.C. 152)

1. The Grand Jury reallegs and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

knowingly and fraudulently made a false statement of under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant **ELWOOD "JACK" CLUCK** filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas a Statement of Financial Affairs in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, wherein he knowingly and fraudulently stated in answer to item "14b" that the only transfer of property that he had made within the prior year was a Deed of Trust covering his community homestead at 417 East Mandalay when in truth and in fact, as he well knew, he had also transferred, within one year before filing his petition:

A. A Real Estate Lien note from Perfect Union Lodge promising to pay the Defendant **ELWOOD "JACK" CLUCK** $50,000.00 and the Real Estate Deed of Trust securing said note, and

B. Approximately 351, more or less, acres of land in McMullen County, Texas; and

C. Three jaguar automobiles; and

D. A pickup truck; and

E. A camper; and

F. A boat; and

G. A 1960 Beechcraft Bonanza Airplane.

All in violation of Title 18, United States Code, Section 152.

COUNT V
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about November 8 and 16, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck*, Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $150,000.00 of which approximately $102,000.00 was in payment for a pre-bankruptcy accounts receivable or debt from the O.D. Dooley Estate. All in violation of Title 18, United States Code, Section 152.

COUNT VI
(18 U.S.C. 152)

1. The Grand Jury reallegs and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about November 8 and 16, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck*, Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $150,000.00 of which approximately $48,000.00 was a referral fee for a pre-bankruptcy referral of a will contest in the O.D. Dooley Estate. All in violation of Title 18, United States Code, Section 152.

COUNT VII
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. From on or about May 1, 1990 and continuing until on or about June 18, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck*, Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the right for himself or his designee to reacquire three jaguar automobiles, a pickup truck, a camper, a

boat, and a Bonanza Airplane. All in violation of Title 18, United States Code, Section 152.

COUNT VIII
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently made a false statement under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant **ELWOOD "JACK" CLUCK** filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas as part of his Statement of Financial Affairs a "Schedule B-2 – Personal Property" in the proceeding entitled *In Re: Elwood Cluck*, Case No. 90-50952K, wherein he knowingly and fraudulently stated "none" in answer to item "v" "Equitable and future interests" when in truth and in fact, as he well knew, he had the right for himself or his designee to reacquire three jaguar automobiles, a pickup truck, a camper, a boat, and a Bonanza airplane.

All in violation of Title 18, United States Code, Section 152.

A TRUE BILL.

/s/ Stella Coupe
FOREPERSON

JAMES H. DEATLEY
United States Attorney
Western District of Texas

BY: /s/ C. Larry Mathews Jr.
C. LARRY MATHEWS, JR.
Assistant United States Attorney
State Bar of Texas No. 13191000